Supreme Court, U.S.
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No. 98-732

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

POLARIS INSURANCE COMPANY, LTD.,

Petitioner,

vs.

CHARLES J. BRUNET, MAGNOLIA HOLDINGS, INC.,
MAINTENANCE DREDGING, INC.
and MAGNOLIA QUARTERBOATS, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

None of the corporate Respondents have any parent companies and/or nonwholly owned subsidiaries.

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THE PARTIES AND STATEMENT OF THE CASE

On May 12, 1995, Respondent, Charles J. Brunet (hereinafter, "Brunet") filed suit against Magnolia Quarterboats, Inc., and Maintenance Dredging, Inc., for injuries arising out of an accident which occurred on October 21, 1994. On October 2, 1995, Brunet filed a First Supplemental and Amended Petition adding Magnolia Holdings, Inc. and its insurer, Polaris Insurance Company, Ltd. (hereinafter, "Polaris") as defendants to this litigation. In its Answer to both the original and First Supplemental Petitions filed on January 22, 1996, Polaris denied that it provided insurance coverage to Magnolia Holdings, Inc., Maintenance Dredging, Inc. and Magnolia Quarterboats, Inc. (all entities hereinafter referred to as, "M/H"). The insureds, M/H, filed third-party demands against their insurer, Polaris, for coverage, defense and indemnity. Thus, both Respondents, Brunet and M/H, seek recovery against Polaris and the positions of Respondents are aligned for purposes of this Brief in Opposition.

On November 15, 1996, Petitioner, Polaris, filed a motion for, and was granted, a Devolutive Appeal. In that motion, Polaris appealed from, "all prior Orders of the Court." Prior to November 15, 1996, the trial court signed the following Orders and/or Judgments:

* *Judgment on Motion to Compel Discovery dated August 5, 1996;*

* *Judgment and Reasons dated October 9, 1996 [Motion to Compel and for Sanctions filed by Charles Brunet; Motion to Strike the Amended Answer of Polaris filed by Magnolia, Motion to Compel and for Sanctions filed by Magnolia, Motion to Amend Third Party Petition filed by*

Magnolia, and Joint Motion to Strike the Pleadings Filed by Polaris filed by both Charles Brunet and Magnolia];

* *Order dated October 21, 1996 [Joint Motion for a Representative of Polaris Insurance Company, Ltd. to Appear at Hearing];*

* *Judgment dated October 28, 1996 at 8:25 a.m. [Joint Motion to Strike Pleadings Filed by Polaris Insurance Company, Ltd., for Failure to Comply with LA-Rev. Stat. Sect. 22:1255 or to Require Posting of Bond Pursuant to La-Rev. Stat. Sect. 22:1255* ***and*** *Joint Return for Sanctions for Failure to Respond Properly to Requests for Production of Documents in Compliance with the Court's Order];*

* *Order dated October 29, 1996 [Motion for Preliminary Default];*

* *Judgment and Reasons dated October 29, 1996 [Joint Motion to Strike the Pleading Filed by Polaris Insurance Company, Ltd. for Failure to Comply with LA-R.S. 22:12551];*

* *Judgment dated November 4, 1996 [Joint Oral Motion for Sanctions for the Failure of Polaris Insurance Company, Ltd. to Comply with the Court Order of October 28, 1996].*

In its original Brief to the Fifth Circuit Court of Appeals filed on April 23, 1997, Polaris provided the following Assignments of Error:

A. The trial court committed error in ruling that:

The Insurance Code of the State of Louisiana requires a non admitted insurer to post security by the authority of LA-R.S. 22:1245 and 1255.

B. The court erred in that:

The adverse presumptions are not supported by the law and are in violation of the equal protection clause and due process clause of the constitution of the United States.

C. The District Court erred in that:

The Motion to Strike Polaris' Pleadings and to Order Polaris to Post Security was decided in consideration of a memorandum and exhibits thereto that were ineffective in that the memorandum was improperly served and the exhibits were not served.

D. The Court erred in issuing:

The Order of October 25, 1996 that Polaris post a security bond in court by 8:30 a.m. on October 28, 1996 which was impossible to comply with.

E. The Court erred in issuing:

The Order of Sanctions for Failure to Appear Pursuant to Joint Debtor Rule is void for lack of jurisdiction.

F. The Court erred in re:

Jurisdiction of the District Court to issue an Order for examination of debtor may be issued only if based on a valid judgment.

G. The Court committed error:

In it's denial of Polaris' Motion to Amend Answer to allege that the MAG II was not a vessel in navigation at the time plaintiff was injured.

It should be noted that although Polaris included Assignment Error "E" in its Brief, the Judgment on the Joint Judgment Debtor Rule filed by Brunet and M/H was signed by the trial court on January 6, 1997, well after the filing of Polaris' Motion for Devolutive Appeal on November 15, 1996. Therefore, Assignment of Error "E" was improperly argued before the Court of Appeals.

On June 13, 1997, Polaris then filed a Writ with the Louisiana Supreme Court. In that Writ, Polaris made following Assignments of Error:

1. *The Fifth Circuit Court of Appeals should not have dismissed Polaris appear regarding the contempt citation and fine for failure to appear for Joint Debtor Rule.*

2. *On October 29, 1996, there was no pending direct contempt upon which fines of could issue without a show cause order. The only contempt was an indirect contempt committed outside the presence of the Court.*

3. *On October 29, 1996, there was no noticed motion pending to issue contempt citation. On October 29, 1996, there was no noticed motion pending to order production of any documents.*

4. *No evidence was presented to the court regarding the alleged constructive contempt.*

5. *The order submitted to the District Court by plaintiff Brunet's attorney was not in consonance with the order from the bench. It contained an order extending to a "any contempt."*

6. *On November 15, 1996 there was no valid judgment on which plaintiff could issue the Joint Debtor Rule or take an Order thereon.*

7. *On November 15, 1996, there was no basis for entry of Judgment by District Court of the 24th Judicial District, Parish of Jefferson, regarding the alleged contempt cited by plaintiff for failure of Polaris to appear therein.*

By Order dated October 3, 1997, the Louisiana Supreme Court granted Writs and the case was remanded to the Fifth Circuit Court of Appeals for consideration on the merits pursuant to its supervisory jurisdiction.

On November 19, 1997, Polaris filed their Brief with the Fifth Circuit Court of Appeals and listed the following Assignments of Error:

A. *Defendant assigns error in that the Court erred in issuing the Order of sanctions for failure to*

appear pursuant to Joint Judgment Debtor Rule is void for lack of jurisdiction.

B. *Defendant assigns error in that the Court erred in that the trial court committed error in ruling that the insurance code of the State of Louisiana requires a non-admitted insurer that issues a policy of marine insurance to post security by authority of LA-R.S. 22:1245 and 1255.*

C. *Defendant assigns error in that the adverse presumptions are not supported by the law and are in violation of the Constitution of the United States.*

D. *Defendant assigns error in that the Court erred in the Motion to Strike Polaris' Pleadings and to Order Polaris to Post Security was decided in consideration of a Memorandum and Exhibits thereto that were ineffective in that the Memorandum was improperly served and the exhibits were not served.*

On March 11, 1998, the Fifth Circuit Court of Appeals reversed in part and affirmed in part the ruling of the trial court. Polaris applied for Writs to the Supreme Court of the State of Louisiana. Polaris' Writs were denied by the Louisiana Supreme Court on May 29, 1998. Subsequent thereto and on August 1998, Polaris filed a Petition for Writ of Certiorari with the Supreme Court of the United States.

Respondents, Brunet and M/H, oppose the Petition for Writ of Certiorari of Petitioner, Polaris, based upon the following:

I.

JURISDICTION

Briefs submitted by Polaris to date have failed to state an appropriate statutory provision conferring jurisdiction upon this Court allowing Polaris to seek a Writ of Certiorari. Polaris' initial Brief cited 28 U.S.C. § 1252 as the basis for jurisdiction, which statute has been repealed and is inapplicable to the instant case. Polaris' current Writ cites 28 U.S.C. § 1254(1) as the basis for jurisdiction which also appears inapplicable in that this matter does not involve an appeal from a United States Court of Appeals and no lower federal court has heretofore exercised jurisdiction in this matter. While it is unclear, Polaris, without stating name, may be seeking Certiorari on the basis of 28 U.S.C. § 1257, which allows a litigant to seek certiorari in instances where a final Judgment has been rendered by the highest court of a state. However, the record will reveal that no final Judgment has been rendered in this matter at any time by the trial court, as all state court appellate relief sought by Polaris has involved interlocutory matters, raised prior to any trial on the merits.

II.

MATTERS OF DISCRETION

Recognizing that a review by this Honorable Court on a Writ of Certiorari is not a matter of right but of judicial discretion, Rules of Supreme Court, Rule 10, the character of the reasons for the Court to consider such a Writ as set forth in Rule 10 strongly suggest that Polaris' Writ should not be granted. This matter not arising from a lower court decision of a United States Court of Appeals, Supreme Court Rule 10(a)'s provisions are inapplicable. Further, the provisions of Supreme Court Rule 10(b), which suggest that granting of a Writ of

Certiorari would be appropriate in instances where a state court of last resort has decided an important federal question in a manner that conflicts with a decision of another state court of last resort or a United States Court of Appeals, is not raised in Polaris' Writ and is, therefore, not applicable herein. Finally, Supreme Court Rule 10(c), which would consider the granting of a Writ in instances where a state court or United States Court of Appeals has decided an important question of federal law that has not been, but should be settled by this Court, or has decided an important federal question which conflicts with a decision of this Court, simply does not apply to this case.

Polaris merely seeks to obtain a Writ from this Court by complaining of alleged erroneous factual findings relative to interlocutory matters, or the misapplication of applicable state law. The charter of the matters sought to be reviewed do not approach or reach a level of federal importance to mandate review by this Court.

Supreme Court Rule 10 plainly states, "A Petition for a Writ of Certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

III.

NO FEDERAL QUESTION RAISED BELOW

Polaris' Brief has failed to state when, or where, any federal questions sought to be raised in any lower court, with the exception of one obscure reference to due process as respects to interlocutory orders relating to discovery and evidentiary rulings against Polaris for failure to comply with Court Orders resulting in sanctions resulting the Court granting adverse resumptions against Polaris. These matters involve a factual

determination made by the court resulting in appropriate sanctions and does not involve any Constitutional issues. Thus, there has been no showing by Polaris that any federal question has timely and properly raised at any stage, and that this Court as jurisdiction to review any Judgment on a Writ of Certiorari. Supreme Court Rule 14(g)(i) clearly requires that Polaris set forth these matters and Polaris' Writ fails to comply with these provisions.

IV.

LACK OF ACCURACY, BREVITY AND CLARITY

It is difficult for Respondents, Brunet and M/H, to fully understand and appreciate what issues are raised herein, based upon the failure of Polaris to succinctly set forth same in its Writ. This, alone, constitutes sufficient grounds for this Court not to grant Certiorari. Supreme Court Rule 14(4) provides that failure ". . . to present with accuracy, brevity and clarity whatever is essential in order to allow ready and adequate understanding of the points . . ." for which consideration is sought is sufficient basis to deny a petition. Based upon the lack of clarity of the submission of Polaris in and of itself, this Court may deny Polaris' Writ on this basis alone.

V.

OBJECTION TO POLARIS' STATEMENT OF THE CASE

In setting forth its Statement of the Case, Polaris' Petition at pages 2 through 6, inclusive, sets forth numerous actual disputes. Brunet and M/H specifically object to the facts as set forth by Polaris and adopt herein their position relative to the applicable Statement of the Case as fully set forth herein.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that this Honorable Court decline to review Polaris' Petition for Writ of Certiorari.

Respectfully submitted,

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